Supreme Court, U. S.
FILED
JUL 30 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-139

SHELL OIL COMPANY AND EXXON CORPORATION,
Petitioners,

v.

GAS-A-TRON OF ARIZONA AND COINOCO,
Respondents.

and

SHELL OIL COMPANY AND EXXON CORPORATION,
Petitioners,

v.

PETROL STOPS NORTHWEST,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

(Counsel listed on inside cover)

July 30, 1976

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

Of Counsel:

THOMAS M. MURPHY
MURPHY & HAZLETT
Tucson, Arizona

WILLIAM SIMON
JOHN S. KINGDON
1730 Pennsylvania
Ave., N.W.
Washington, D. C. 20006
(202) 872-8800
Counsel for Petitioner,
Shell Oil Company

Of Counsel:

CHARLES L. STROUSS, JR.
JENNINGS, STROUSS &
SALMON
Phoenix, Arizona

ROBERT L. NORRIS
Post Office Box 2180
Houston, Texas 77001
(713) 221-3595
Counsel for Petitioner,
Exxon Corporation

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PETROL STOPS NORTHWEST,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Shell Oil Company ("Shell") and Exxon Corporation ("Exxon") respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on April 29, 1976. The panel composed of Circuit Judges Browning and Hufstedler and District Judge Renfrew (sitting by designation) *sua sponte* withdrew its original *per curiam* opinion and substi-

tuted a revised opinion reversing in its entirety an Order jointly entered by two judges of the United States District Court for the District of Arizona disqualifying on ethical grounds Richard D. Burbidge, Esquire ("Mr. Burbidge") and the Daniel L. Berman law office (the "Berman office") from further representing respondents in that District in two private antitrust suits filed against Shell, Exxon and several other defendants.

OPINIONS BELOW

The revised opinion of the Court of Appeals for the Ninth Circuit in *Gas-A-Tron of Arizona and Coinoco* v. *Union Oil Co. of California, et al.* (Nos. 74-3287, 74-3288) ("*Gas-A-Tron*"); *Petrol Stops Northwest* v. *Continental Oil Co., et al.* (Nos. 74-3289, 74-3290) ("*Petrol Stops*") is unofficially reported at 1976-1 CCH Trade Cas. ¶60,862 (9th Cir. 1976).[1] The initial opinion of the Ninth Circuit in *Gas-A-Tron* and *Petrol Stops* is unofficially reported at 1976-1 CCH Trade Cas. ¶60,689 (9th Cir. 1976).[2] The Memorandum and Order jointly entered by District Court Judges William C. Frey and James A. Walsh in these cases is unofficially reported at 1974-2 CCH Trade Cas. ¶75,225 (D. Ariz. 1974.[3]

JURISDICTION

The jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1254(1).

A judgment of the Circuit Court of Appeals for the Ninth Circuit was entered on April 29, 1976; an order

[1] Reprinted in Appendix A to this petition.

[2] Reprinted in Appendix B to this petition.

[3] Reprinted in Appendix C to this petition.

denying petitioners' suggestion for rehearing *en banc* was entered on July 6, 1976.

QUESTION PRESENTED

Whether this Court, which has never spoken to the principles of professional responsibility addressed by Canons 4 and 9 of the Code of Professional Responsibility of the American Bar Association, should reinstate a trial court ruling entered by two district court judges in companion lawsuits which interprets those principles to preserve the inviolability of the attorney-client relationship and promote the integrity of the legal profession, or whether this Court should permit an intermediate appellate court to undermine those important public policy goals for the sole purpose of permitting an attorney to change law firms and immediately thereafter actively participate in prosecuting litigation against his former clients.

STATEMENT OF THE CASE

The law office of Daniel L. Berman of Salt Lake City, Utah, instituted these private antitrust suits against Shell, Exxon and several other defendants in the United States District Court for the District of Arizona, Tucson Division, in late 1973.[4]

[4] The jurisdiction of the District Court was invoked pursuant to 15 U.S.C. § 15 (1973). In the *Petrol Stops* complaint, filed on behalf of an independent marketer of gasoline in Tucson, plaintiffs alleged that petitioners and ten other defendants had violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, by unlawfully conspiring to restrain trade and to monopolize trade in the manufacture, sale and distribution of refined petroleum products. In the *Gas-A-Tron* complaint, filed on behalf of two other Tucson gasoline distributors, plaintiffs alleged violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, similar to those made in *Petrol Stops* and also claimed that petitioners and seven other

Within a few months after the Berman office filed these complaints, Robert L. Norris, counsel for Exxon, observed that plaintiffs in both *Gas-A-Tron* and *Petrol Stops* were actively represented by Richard D. Burbidge ("Mr. Burbidge") who had very recently joined the Berman office after serving as counsel to both Shell and Exxon while associated with McCutchen, Black, Verleger & Shea ("McCutchen"), a Los Angeles, California, law firm. (C-2). The record demonstrated that Mr. Berman hired Mr. Burbidge without consulting any member of the McCutchen firm or any attorney for Shell or Exxon about the possibility of a conflict arising from Mr. Burbidge's joining the Berman office. Although that office was actively prosecuting the *Gas-A-Tron* and *Petrol Stops* lawsuits while Mr. Burbidge was with McCutchen, Mr. Berman did not question Mr. Burbidge about a possible conflict until the issue was raised by Exxon's counsel who observed Mr. Burbidge representing the plaintiffs at a deposition in this litigation only eight days after leaving McCutchen. (C-7, C-8).

On March 22, 1974, Exxon moved to disqualify Mr. Burbidge and the Berman office from both *Gas-A-Tron* and *Petrol Stops* (R.120-R.162, R.596-R.613)[5] to prevent "confidential information obtained by Richard Burbidge in the course of his professional relations with Exxon" (R.121) from being used against his former client in the pending litigation. The motion was based upon the standards of conduct prescribed by

defendants violated the Robinson-Patman Act, 15 U.S.C. § 13(a), by engaging in unlawful price discrimination.

[5] All "R" references are to the record on appeal which petitioners are requesting the Ninth Circuit's Clerk's office to deliver to this Court.

Canons 4[6] and 9[7] of the American Bar Association Code of Professional Responsibility. Shell filed a similar motion (R.138-R.162; R.613-R.636).

Petitioners' disqualification motions were supported by affidavits[8] and extensively briefed.[9] With the consent of Shell and Exxon, the initial hearing on their disqualification motions was postponed to permit the Berman office to depose Shell's and Exxon's counsel and the McCutchen partners who supervised Mr. Burbidge's work for Shell and Exxon. Mr. Berman deposed Franklin H. Wilson, for whom Mr. Burbidge worked on Shell matters, but abandoned his plans to depose Jack D. Fudge, who supervised Mr. Burbidge's work for Exxon.

A. The District Court's Disqualification Ruling

After considering Shell and Exxon's motions at a consolidated hearing, Judges Frey and Walsh entered a jointly signed Memorandum and Order disqualifying Mr. Burbidge and the Berman office from participating further in both the *Gas-A-Tron* and *Petrol Stops* suits "so long as the cases involve Shell or Exxon." (C-9). Their decision focused particular attention on those record facts which displayed Mr. Berman's disregard

[6] Canon 4 provides: "A Lawyer Should Preserve the Confidences and Secrets of a Client."

[7] Canon 9 provides: "A Lawyer Should Avoid Even the Appearance of Professional Impropriety."

[8] (R.128-R.130; R.131-R.132; R.141-R.142; R.310-R.317; R.333-R.351; R.605-R.607; R.608-R.609; R.618-R.619; R.785-R.792; R.808-R.826).

[9] (R.123-R.127; R.146-R.162; R.163-R.244; R.269-R.351; R.600-R.604; R.623-R.636; R.637-R.676; R.743-R.775).

of the ethical principles stated in the Code of Professional Responsibility. Because of Mr. Berman's past experiences litigating in this industry, the District Court found that he "should have . . . known" of the McCutchen firm's close relationship with Shell and Exxon. (C-2). Since *Gas-A-Tron* and *Petrol Stops* were pending while Mr. Burbidge was at McCutchen, the District Court found that Mr. Berman should have investigated the potential conflict arising from his employment of Mr. Burbidge. (C-7). In fact, neither Mr. Berman nor Mr. Burbidge "discussed with anyone" the potential conflict which would arise once Mr. Burbidge was "hired away" by the Berman office. (C-7).

The District Court's disapproval of Mr. Berman's actions was justified by the fact that within *eight days* after joining the Berman office, Mr. Burbidge was actively participating in the *Gas-A-Tron* litigation. The record demonstrated that Mr. Berman had assigned Mr. Burbidge to prosecute this action against his former clients, Shell and Exxon, as soon as the "hiring away" process was completed. (C-8). The active participation of Mr. Burbidge, absent any efforts to "screen" him from these cases, was the gravamen of the factual findings that compelled Judges Frey and Walsh to enter the disqualification Order.

The Order entered by Judges Frey and Walsh contained specific factual findings regarding the scope of Mr. Burbidge's responsibilities for Shell and Exxon at McCutchen and the relationship of those duties to the issues in *Gas-A-Tron* and *Petrol Stops*. The District Court found that while associated with McCutchen Mr. Burbidge "was Shell's counsel in four cases", two of which "involved the relationship between Shell and a dealer". (C-3). In addition, Mr. Burbidge "had

access to all of the Shell files in the McCutchen firm", including an antitrust action which "appear[ed] to be the same claim made by the [respondents] in these cases". (C-4). Prior to joining the Berman office, Mr. Burbidge had represented an Exxon employee in a case which "gave rise to a companion antitrust action" in which Exxon dealers challenged Exxon's marketing practices. (C-4).

Having made the factual determination that Mr. Burbidge "had access to confidential information about Shell and Exxon's dealer relationships, marketing practices and antitrust suits" (C-7), Judges Frey and Walsh concluded that the issues involved in *Gas-A-Tron* and *Petrol Stops* were "substantially related" to matters Mr. Burbidge worked on for Shell and Exxon at McCutchen. The District Court's analysis of the *Gas-A-Tron* and *Petrol Stops* complaints, deposition testimony and plaintiffs' interrogatories demonstrated that "one of the central issues in both [cases] is the relationship between Shell and Exxon and their dealers". (C-3). Accordingly, Judges Frey and Walsh disqualified Mr. Burbidge as well as "[t]he law firm of Daniel L. Berman and all members or associates thereof" from further participation in the antitrust suits "so long as the cases involve Shell or Exxon." (C-9).[10]

---

[10] Shortly after Judges Frey and Walsh disqualified the Berman office, respondents' local counsel sought "a clarification of the terms of disqualification imposed" (R.368; R.850), contending that the District Court applied an incorrect standard in ordering the disqualification (R.376-R.378; R.858-R.860). This motion was denied by Judges Frey and Walsh, who now have *each ruled twice* that the record before them supported the disqualification of both Mr. Burbidge and the Berman firm.

B. The Ninth Circuit's Initial Opinion Affirming Mr. Burbidge's Disqualification

Respondents appealed the District Judges' disqualification Order to the Court of Appeals for the Ninth Circuit. The panel initially *affirmed* that portion of the Order which disqualified Mr. Burbidge, but ruled as a matter of law that the remaining three lawyers in the Berman office could continue to sue their colleagues' former clients. (B-5). The appeals panel acknowledged that:

> *the district court was within the bounds of its discretion in ordering his [Mr. Burbidge's] disqualification to prevent any appearance of impropriety.* We cannot discount the district court's appropriate concern for the appearance of impropriety that can be caused when a lawyer, situated as was Mr. Burbidge, had physical access to a client's confidential information. (B-4). (emphasis added).

C. The Ninth Circuit's Substitute Opinion Overturning Mr. Burbidge's Disqualification

Shell and Exxon sought review of that portion of the Ninth Circuit's initial decision which permitted the remaining three members of the Berman office to prosecute the pending antitrust suits against them. Although Mr. Burbidge did *not* petition for a rehearing of the affirmance of his disqualification, the panel *withdrew* its initial opinion *sua sponte* and issued a substituted opinion reversing, in its entirety, the disqualification Order entered by Judges Frey and Walsh. (A-1).

REASONS FOR GRANTING THE WRIT

A. If Allowed to Stand, the Court of Appeals Decision Will Subvert Public Confidence in the Legal Profession and Weaken the Enforcement of the Canons of Professional Responsibility

In *Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F.2d 562 (2d Cir. 1973), the Court of Appeals for the Second Circuit recognized that whether an attorney should be disqualified from representing a party in litigation against a former client presents "a question of acute sensitivity and importance, touching upon vital concerns of the legal profession and the public's interest in the scrupulous administration of justice." *Id.* at 564. In upholding the lower court's disqualification Order, the Court stressed that because of the importance of preserving public respect for the bar, disqualification may be necessary where the *appearance* of a possible violation of confidence exists. *Id.* at 571. More recently, in *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corp.*, 518 F.2d 751 (2d Cir. 1975), the Court of Appeals for the Second Circuit reaffirmed the "paramount importance" of maintaining the highest standards of professional conduct and the scrupulous administration of justice. *Id.* at 757. Likewise, other courts, adhering to well-established precedent, have also placed great wieght on avoiding the appearance of impropriety in ruling on disqualification motions. In *Richardson* v. *Hamilton International Corp.*, 333 F.Supp. 1049 (E.D. Pa. 1971), *aff'd*, 469 F.2d 1382 (3d Cir. 1972), *cert. denied*, 411 U.S. 986 (1973), the court found "*some* relationship" between an attorney's former representation and the current litigation. *Id.* at 1054 (emphasis added). Although acknowledging the case presented a "close question," the court con-

cluded that "to avoid the 'appearance of evil' disqualification must be directed." *Id.* Similarly, in upholding the disqualification of the City's counsel in *General Motors Corp.* v. *City of New York,* 501 F.2d 639 (2d Cir. 1974), the court noted: "[W]e must act with scrupulous care to avoid any *appearance* of impropriety lest it taint . . . the legal profession." *Id.* at 649 (emphasis by the court).[11]

These decisions require that in cases of doubt, an attorney should be disqualified from litigating against his former client. This rule is necessary because "[t]he stature of the profession and the courts, and the esteem in which they are held, are dependent upon the absence of even semblance of improper conduct." *Emle Industries, Inc.* v. *Patentex, Inc., supra,* at 575. Judges Frey and Walsh heeded these warnings and applied this rationale to the record facts:

> Any doubts as to whether Mr. Burbidge's former representation of Shell and Exxon is substantially related to the present suits must be resolved in favor of Shell and Exxon. . . . (C-9)

Reversal of the Ninth Circuit's decision is required to restore effect to the Canons of Ethics and to prevent their erosion. As recognized in *Empire Linotype School* v. *United States,* 143 F. Supp. 627, 633 (S.D.N.Y. 1956), "[w]ithout firm judicial support, the Canons of Ethics would be only reverberating generalities," *quoted with approval in Motor Mart, Inc.* v. *Saab*

[11] *Accord Hull* v. *Celanese Corp.,* 513 F.2d 568, 571 (2d Cir. 1975); *Allied Realty of St. Paul, Inc.* v. *Exchange National Bank of Chicago,* 408 F.2d 1099, 1101-1102 (8th Cir. 1969), *cert. denied,* 496 U.S. 823 (1969); *United States* v. *Trafficante,* 328 F.2d 117, 120 (5th Cir. 1964).

Motors, Inc., 359 F. Supp. 156 (S.D.N.Y. 1973). Absent reversal, the Ninth Circuit's opinion will have a chilling effect on the attorney-client relationship. Canon 4 is premised on the rationale that a client should be encouraged to reveal to his attorney all possibly pertinent information. *Richardson* v. *Hamilton International Corp., supra* at 1384. Yet, clients will be significantly deterred from confiding in their attorneys if they believe that confidences which they repose in their counsel may later be used against them with judicial approval.

B. The Court of Appeals Incorrectly Decided an Important Question Relating to the Conduct of Attorneys Which Has Not Been Settled by This Court

Judge Adams of the Third Circuit recently set forth the considerations which should guide district court judges in the exercise of their discretion in ruling on motions to disqualify opposing counsel:

> The trial judge should focus on the similarities between the two factual situations, the legal questions posed, and the nature and extent of the attorney's involvement with cases. . . . Where a threshold quantum of similarity exists between the prior and current representations, courts must be scrupulous to ensure that even the appearance of impropriety is avoided. *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corp., supra* at 760. (concurring opinion).

This procedure was followed meticulously by Judges Frey and Walsh in ruling on the motions to disqualify Mr. Burbidge and the Berman office from further participation in plaintiffs' litigation against petitioners.

Judges Frey and Walsh found that while associated with McCutchen, Mr. Burbidge had "access to con-

fidential information about Shell and Exxon's dealer relationships, marketing practices and antitrust suits." (C-7) Since "one of the central issues in both [the *Gas-A-Tron* and *Petrol Stops*] actions is the relationship between Shell and Exxon and their dealers" (C-3), Judges Frey and Walsh justifiably concluded that the pending suits were "substantially related" to the work Mr. Burbidge performed for Shell and Exxon while at McCutchen (C-5).

A lawyer should be disqualified from representing a party in litigation if he formerly represented an adverse party in a manner "substantially related" to the pending litigation.[12] Moreover, under circumstances such as present in this case, the disqualification of one lawyer in a firm generally constitutes disqualification of all other members of that firm. *Cinema 5, Ltd.* v. *Cinerama, Inc., et al.*, 528 F.2d 1384 (2d Cir. 1976); *Silver Chrysler Plymouth, Inc., supra; American Can Co.* v. *Citrus Feed Co., supra; Laskey Bros. of West Virginia* v. *Warner Bros. Pictures,* 224 F.2d 824 (2d Cir. 1975); Formal Opinions 169 (1937), 49 (1931), 33 (1931), and 16 (1929) of the American Bar Association Committee on Professional Ethics ("ABA Committee"); Informal Opinions 1336 (1975) and 906 (1966) of the ABA Committee; American Bar Association Disciplinary Rule 5-105(D). These principles were correctly applied by Judges Frey and Walsh to the facts presented to them in the affidavits and deposition testimony relating to this issue.

Mr. Burbidge was entrusted with and exposed to his client's confidences while an associate at McCutchen.

[12] *Silver Chrysler Plymouth, Inc., supra; Emle Industries, Inc., supra; American Can Co.* v. *Citrus Feed Co.*, 436 F.2d 1125 (5th Cir. 1971).

He attempted to settle a Shell dealer case (Wilson Dep. at 62-63) and was given considerable discretion in handling all of his assignments for Shell (*Id.* at 21). He discussed with another Exxon attorney its "procedures and practices in the marketing of gasoline and other products." (R. 132). These record facts were not disputed.

The District Court Judges' disqualification Order, which was supported by reference to these record facts, was overturned when the Ninth Circuit summarily concluded: "The record in this case does not support the district court's decision." (A-5) The panel's summary conclusion was contrary to the factual findings made by the trial judges on the extensive record before them. Rather than being grounded on the record, the panel's conclusion was referenced to two unrelated cases in which District Courts had refused to disqualify Mr. Burbidge from representing various plaintiffs against Shell. *Bonus Oil Co.* v. *American Petrofina Co.,* 1975-1 Trade Cas. ¶ 60,315 (D. Neb. 1975) is clearly distinguishable from both *Gas-A-Tron* and *Petrol Stops* by the fact that Shell does not market gasoline in Nebraska. Nonetheless, it is important that the court in *Bonus Oil Co.* observed that confidential information Mr. Burbidge received while working for Shell might be helpful in representing independent marketers in litigation against his former client. 1975-1 Trade Cas. ¶ 60,315 at 66,266. In the other case cited by the panel, the Tenth Circuit acknowledged ". . . indications at least of the existence of a conflict" between Mr. Burbidge's prior representation of Shell and his participation as a plaintiff's attorney against Shell. *In the Matter of Michael W. Graney,* 518 F.2d 311, 315 (10th Cir. 1975).

Thus, the Ninth Circuit committed clear legal error in overruling the District Judges' disqualification of Mr. Burbidge and the Berman office. Unless reversed, this erroneous holding will serve as a dangerous precedent allowing attorneys to change law firm affiliations and instantly use the confidences gained in representing a client in actively prosecuting litigation against his former client. The Ninth Circuit opinion condoning the Burbidge-Berman actions severely undermines the sanctity of the attorney-client relationship.

Further, this Court has long recognized that the court before which an action is pending has a great interest in maintaining the ethical standards of the members of its bar. *Ex parte Burr,* 9 Wheat (22 U.S.) 529, 6 L. Ed. 152 (1824). Therefore, the role of an appellate tribunal in reviewing a disqualification Order is a "limited one." *Silver Chrysler Plymouth, Inc., supra,* at 758.

Appellate courts should accord great deference to the factual findings of district court judges in such matters because: "the control of attorneys in trial litigation is within the supervisory powers of the trial judge," *Waters* v. *Western Co. of North America,* 436 F.2d 1072, 1073 (10th Cir. 1971). The trial court's exercise of its "very broad" discretion will not be overturned unless "clearly erroneous." *Accord, Hull, supra,* at 571; *Ceramco, Inc.* v. *Lee Pharmaceuticals,* 510 F.2d 268 (2d Cir. 1975); *Richardson, supra,* at 1386; *E. F. Hutton* v. *Brown,* 305 F. Supp. 371, 378 (S.D. Tex. 1969).

Thus, unless "no reasonable man would take the view adopted by the trial court," its rulings on matters of "discretion" should be upheld. *Delno* v. *Market St. Ry.,* 124 F.2d 965, 967 (9th Cir. 1942); *quoted with approval* in *Lindy Bros. Builders, Inc., of Phila., et al.* v. *American Radiator & Standard Sanitary Corp., et al.* (3d Cir., July 2, 1976) (*Slip Op.* at 19) ("*Lindy II*"). Where a district court goes "to great lengths to articulate the reasons for its decision" on a discretionary issue, significant weight should be given to its findings. *Lindy II* at 20.

In its initial opinion, the appeals panel acknowledged that substantial deference should be accorded the trial court's factual findings on matters relating to the conduct of attorneys in its courtroom (B-4). Yet, three months later, the same panel *sua sponte* reversed both its own and the District Judges' disqualification of Mr. Burbidge without justification. The first three pages of its four-and-one-half page substituted decision tracked *in haec verba* its earlier opinion affirming the disqualification of Mr. Burbidge. Without even a cursory analysis of the deliberate factual findings of the District Court, the panel summarily concluded that, "[t]he record in this case does not support the district court's decision" (A-5).

The appeals court's failure to support its reversal of the District Court Judges' findings is particularly disquieting in matters relating to legal ethics:

> Unless courts delineate the various policy considerations motivating their decisions, precedents offer little guidance to attorneys seeking to fulfill their ethical obligations. Note, *Disqualification of Attorneys For Representing Interests Adverse to Former Clients,* 64 Yale L.J. 917, 928 (1955).

By usurping the function of the trier of fact, particularly the detailed findings of two district court judges on the ethical issue of the disqualification of

counsel to appear in their court, the Ninth Circuit has established a dangerous precedent which should be reversed by this Court. This case offers this Court a compelling opportunity to exercise its responsibilities for ensuring the proper functioning of the federal judiciary and re-state the proper roles of trial and appellate courts in matters relating to the conduct of attorneys.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Ninth Circuit and to reinstate the District Court's Order disqualifying the law office of Daniel L. Berman and all members or associates thereof from further participation in these cases so long as Shell or Exxon are defendants.

Respectfully submitted,

Of Counsel:

THOMAS M. MURPHY
MURPHY & HAZLETT
Tucson, Arizona

WILLIAM SIMON
JOHN S. KINGDON
1730 Pennsylvania
Ave., N.W.
Washington, D. C. 20006
(202) 872-8800

Counsel for Petitioner,
Shell Oil Company

Of Counsel:

CHARLES L. STROUSS, JR.
JENNINGS, STROUSS &
SALMON
Phoenix, Arizona

ROBERT L. NORRIS
Post Office Box 2180
Houston, Texas 77001
(713) 221-3595

Counsel for Petitioner,
Exxon Corporation

July 30, 1976

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed April 29, 1976, Emil E. Melfi, Jr.
Clerk, U.S. Court of Appeals]

Nos. 74-3287; 74-3288
GAS-A-TRON OF ARIZONA AND COINOCO,
Plaintiffs-Appellants,
v.
UNION OIL COMPANY OF CALIFORNIA, *et al.*,
Defendants-Appellees.

Nos. 74-3289; 74-3290
PETROL STOPS NORTHWEST,
Plaintiff-Appellant,
v.
CONTINENTAL OIL COMPANY, *et al.*,
Defendants-Appellees.

Order

Before: BROWNING and HUFSTEDLER, Circuit Judges, and RENFREW,* District Judge

The panel as constituted in the above cases *sua sponte* orders withdrawal of our prior per curiam opinion [Slip Op'n January 14, 1976] and substitutes therefor the revised opinion annexed hereto.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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*Honorable Charles B. Renfrew, Northern District of California, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed April 29, 1976, Emil E. Melfi, Jr.
Clerk, U.S. Court of Appeals]

Nos. 74-3287; 74-3288

GAS-A-TRON OF ARIZONA AND COINOCO,
Plaintiffs-Appellants,
v.
UNION OIL COMPANY OF CALIFORNIA, ET AL.,
Defendants-Appellees.

Nos. 74-3289; 74-3290

PETROL STOPS NORTHWEST,
Plaintiff-Appellant,
v.
CONTINENTAL OIL COMPANY, ET AL.,
Defendants-Appellees.

Opinion

Consolidated Appeals from the United States District Court for the District of Arizona.

Before: BROWNING and HUFSTEDLER, Circuit Judges, and RENFREW,* District Judge

PER CURIAM:

The district court disqualified all lawyers in the firm of Berman and Giauque ("Berman") from representing the plaintiffs in these private antitrust actions brought against several major oil companies, including Shell Oil Company ("Shell") and Exxon Corporation ("Exxon"), for as long as these corporations were

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defendants.[1] Berman appeals. The disqualification order was based on the district court's conclusion that disqualification of the whole firm was necessary to prevent any appearance of impropriety that might result because Berman had hired a young associate who had previously worked for a large law firm that had represented Shell and Exxon in other cases.

Late in 1973, Berman filed these actions against Exxon, Shell and others claiming that they violated the antitrust laws in various respects in their relationship with their dealers and other marketers of refined petroleum products throughout the United States, with particular emphasis on the West Coast area. In February 1974, Berman hired Richard D. Burbidge as an associate. Mr. Burbidge had been employed by the Los Angeles firm of McCutchen, Black, Verleger & Shea ("McCutchen"), as an associate from August 1, 1972 until January 31, 1974. McCutchen had represented Shell and Exxon in a variety of matters, including some antitrust cases, over a period of many years. During his employment with McCutchen, Burbidge worked on four cases in which that firm represented Shell: (1) He spent 32 hours on an action against Shell filed by a manufacturer to recover the price of a storage tank delivered to Shell. (2) He spent 50.1 hours drafting pleadings and a memorandum in an unlawful detainer action by Shell against one of its dealers. (3) He logged 31.9 hours drafting motions to defeat an action against Shell by a landlord contending that Shell had failed to occupy a service station in violation of a lease provision. (4) He logged about

[1] The two antitrust cases were assigned to different district judges. For the purpose of ruling upon Shell's and Exxon's disqualification motions, the cases were consolidated and the motions were heard and decided by both district judges sitting together. We discuss the case as if a single district judge had issued the order.

19 hours formulating a settlement of an action against Shell by one of its former dealers who claimed that Shell had wrongfully terminated his dealership. Mr. Burbidge performed no services in any case on behalf of Exxon. However, he did represent a former Exxon employee in a slander action against the employee and Exxon in which Exxon paid the former employee's legal fees, including compensation for 38.9 hours that Mr. Burbidge noted on his time sheets. Mr. Burbidge also examined a memorandum filed in court by Exxon in support of its motion to dismiss a different class action. In short, Mr. Burbidge performed an assortment of tasks commonly handled by young associates in large law firms, and, among these, he worked on litigation directly and indirectly affecting cases that his firm undertook for Shell and Exxon.

The McCutchen firm retained a large volume of files relating to litigation and other matters that the firm had handled for Shell and Exxon over the years. It is undisputed that these files contained confidential material and that many lawyers in the McCutchen firm had personal knowledge of confidences received from Shell and Exxon. However, Mr. Burbidge flatly denied that he ever reviewed any of the files other than those in the cases earlier described, and he also denied that he received any confidential information from anyone about Shell and Exxon while he was employed by McCutchen. His testimony is uncontradicted.

We fully agree with the following principles stated by the Third Circuit in *Richardson v. Hamilton International Corp.*, 469 F.2d 1382 (1972):

> "Whenever an allegation is made that an attorney has violated his moral and ethical responsibility, an important question of professional ethics is raised. It is the duty of the district court to examine the charge, since it is that court which is authorized to supervise the conduct of the members of its bar. The courts, as well as the bar, have a responsibility to maintain public confidence in the legal profession. This means that a court may disqualify an attorney for not only acting improperly but also for failing to avoid the appearance of impropriety.
>
> "[T]he regulation of attorneys appearing before the district court in these matters will be disturbed only when, on review of the record, we can say that the district court abused its permissible discretion." [Footnotes omitted. 469 F.2d at 1385-86.]

We recognize that the primary responsibility for controlling the conduct of lawyers practicing before the district court lies with that court, and not with us. We will not disturb the district court's exercise of its discretion in fulfilling that responsibility if the record reveals any sound basis for its discretion disqualifying or refusing to disqualify a lawyer. The record in this case does not support the district court's decision. The district court's disqualification of Mr. Burbidge rested upon its determination that the pending litigation was "substantially related" to the matters in which he had previously represented Shell and Exxon while he was associated with McCutchen. Mr. Burbidge's situation was almost identical to that of the young associates whose claimed disqualification was considered in *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751 (2d Cir. 1975), *Redd v. Shell Oil Co.*, Civil No. C-104-71 (D. Utah, decided Sept. 2, 1974), reversed on other grounds *sub nom. In the Matter of Michael W. Garvey*, —— F.2d —— (10 Cir. 1975), and *Bonus Oil Co. v. American Petro-*

fina Co., No. CV-73-L-165 (D. Neb., decided May 1, 1975). In each case, the court decided that the associate was not disqualified because no substantial relationship existed between the pending litigation and the matters upon which he had worked for the client during his prior association. We agree with the reasoning in those cases. Here, as in those cases, the associate had not actually obtained any confidential information about either Shell or Exxon that would be relevant to the pending litigation,[2] and he had not worked on matters that were "substantially related" to the pending litigation.

We share the district court's concern for the appearance of impropriety. However, we are convinced that any initial inference of impropriety that arose from Mr. Burbidge's potential physical access to the files of Exxon and Shell and from his association with lawyers who did know confidential information about them was dispelled by evidence that he saw none of the files other than those relating to the cases assigned to him heretofore described and that he heard no confidences about Exxon and Shell from the lawyers with whom he was earlier associated.

Berman's disqualification was based solely on Mr. Burbidge's disqualification, and that disqualification vanishes with Mr. Burbidge's nondisqualification.

Reversed.

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[2] Unlike *Chugach Electric Ass'n* v. *United States District Court* (9th Cir. 1966) 370 F.2d 441, the record provides no basis for an inference that Mr. Burbidge gained any actual knowledge of the private affairs of Shell or Exxon that could have been used by him in these antitrust cases.

[Filed, Jan. 14, 1976; Emil E. Melfi, Jr., Clerk, U.S. Court of Appeals]

UNITED STATES COURT OF APPEALS
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The McCutchen firm retained a large volume of files relating to litigation and other matters that the firm had handled for Shell and Exxon over the years. It is undisputed that these files contained confidential material and that many lawyers in the McCutchen firm had personal knowledge of confidences received from Shell and Exxon. However, Mr. Burbidge flatly denied that he ever reviewed any of the files other than those in the cases earlier described, and he also denied that he received any confidential information from anyone about Shell and Exxon while he was employed by McCutchen. His testimony is uncontradicted.

We fully agree with the following principles stated by the Third Circuit in *Richardson* v. *Hamilton International Corp.*, 469 F.2d 1382 (1972):

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examine the charge, since it is that court which is authorized to supervise the conduct of the members of its bar. The courts, as well as the bar, have a responsibility to maintain public confidence in the legal profession. This means that a court may disqualify an attorney for not only acting improperly but also for failing to avoid the appearance of impropriety.

"[T]he regulation of attorneys appearing before the district court in these matters will be disturbed only when, on review of the record, we can say that the district court abused its permissible discretion." [Footnotes omitted. 469 F.2d at 1385-86.]

The district court did not exceed its discretion in ordering Mr. Burbidge's disqualification. Although nothing in the record casts any shadow on Mr. Burbidge's professional integrity or his good faith in resisting disqualification, the district court was within the bounds of its discretion in ordering his disqualification to prevent any appearance of impropriety. We cannot discount the district court's appropriate concern for the appearance of impropriety that can be caused when a lawyer, situated as was Mr. Burbidge, had physical access to a client's confidential information. Despite the lawyer's stout and uncontradicted protestation that he never glimpsed or heard any of that information, a client's doubt may linger and the appearance of impropriety may be undimmed.

However, the district court went afield in extending its appearance rationale to disqualify Berman. The litigation upon which Mr. Burbidge worked during his association with McCutchen was either entirely remote from this antitrust litigation or only peripherally related to the subject matter. Unlike *Chugach Electric Ass'n* v. *United States District Court,* 370 F.2d 441

(9th Cir. 1966), the record provides no basis for an inference that Mr. Burbidge gained any actual knowledge of the private affairs of Shell or Exxon that could have been used by him in these antitrust cases. *A fortiari,* there is no room for an inference that Berman might have acquired any confidential information from Mr. Burbidge. Unless we were willing to say that the law will imply an appearance of impropriety whenever a firm hires a lawyer whose association with his prior firm gave him physical access to confidential information that might be relevant to the new firm's action against the former employer's client, we cannot uphold the order disqualifying Berman. We are not willing to do so because we think that would be carrying appearances too far.

Affirmed in part, reversed in part and remanded for further proceedings consistent with the views herein expressed.

The parties shall bear their own costs on appeal.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. Civ. 73-191-TUC-WCF

GAS-A-TRON OF ARIZONA AND COINOCO,
Plaintiffs,

vs.

UNION OIL COMPANY OF CALIFORNIA, *et al.*,
Defendants.

No. Civ. 73-212-TUC-JAW

PETROL STOPS NORTHWEST,
Plaintiff,

vs.

CONTINENTAL OIL CO., *et al.*,
Defendants.

Memorandum and Order

Defendants Shell Oil Company and Exxon Corporation have each moved to disqualify plaintiffs' attorneys from representing plaintiffs in these two cases pending in this Court, so long as Shell and Exxon are defendants. These cases were assigned to different judges and were consolidated for the hearing and disposition of such motions to disqualify some of the plaintiffs' attorneys, specifically Mr. Berman and all his partners and associates.

Plaintiffs filed a joint answering memorandum and Exxon and Shell filed a joint reply. The motions came on for hearing on April 29, 1974. Subsequently, on June 3, 1974, defense counsel filed a letter memorandum setting forth the amendment to the Code of Professional Responsibility of the American Bar Association. On June 7, 1974, plaintiffs' counsel responded with a letter memorandum. The matter is deemed submitted.

Defendants' motions contend that representation of the plaintiffs by the firm of Daniel L. Berman, with which Richard D. Burbidge is associated, constitutes a breach of Canons 4 and 9 of the Code of Professional Responsibility. The Disciplinary Rules under Canon 4 spell out the obligations of an attorney not to disclose the confidences and secrets of a former client. Canon 9 states that a lawyer should avoid even the *appearance* of professional impropriety.

Richard D. Burbidge was previously associated with the firm of McCutchen, Black, Verleger and Shea, a large Los Angeles law firm. Mr. Burbidge was a law clerk for the McCutchen firm from July, 1972 to December, 1972. He then became an associate and stayed with the firm until January 31, 1974, at which time Mr. Burbidge left to work for Mr. Berman's firm.

The McCutchen firm has represented Shell Oil in California for well over 40 years (Affidavit of Franklin H. Wilson). Until 1949 the McCutchen firm was general counsel for Shell on the West Coast and still maintains a close relationship with Shell. McCutchen is one of the three firms which handles substantially all of Shell's antitrust business (William G. Winters' deposition 8, 14). The firm functions as house counsel for Exxon and is only one of five law firms which represents Exxon in antitrust matters (Dillard W. Baker's deposition 43, 44, 9-10).

The relationship of Shell and Exxon with the McCutchen firm should have been known to Mr. Berman since his practice involves the representation of plaintiffs in private antitrust actions against the petroleum industry (Berman affidavit).

The complaints in both cases at hand charge the defendants with comprehensive and illegal conspiratorial and predatory conduct aimed at the suppression and elimination of independent marketers of gasoline. The

complaint in Petrol Stops charges that Shell and Exxon's contractual relations with their branded dealers are a part of the alleged conspiracy (Plaintiffs' Opposition Memorandum 5-7). Mr. Timms, a plaintiff in the Gas-A-Tron case makes the same allegation in his deposition. The Gas-A-Tron complaint alleges that the defendants discriminated in price by charging some dealers a higher price than others. Thus, one of the central issues in both actions is the relationship between Shell and Exxon and their dealers.

In the eighteen months that Mr. Burbidge worked for the McCutchen firm he was Shell's counsel in four cases. He also represented an Exxon employee; the time spent on this case was billed to Exxon.

Two of the four Shell cases involved the relationship between Shell and a dealer (*Shell Oil Company* v. *Abu-Hajar and Childers* v. *Shell Oil Company*). A third case, *Rosenfeld* v. *Shell Oil Company,* was an action brought by a Shell landlord alleging that Shell had breached a lease agreement.

Mr. Franklin H. Wilson, a partner in the McCutchen firm, testified that Mr. Burbidge had access to all of the Shell files in the McCutchen firm and that he could look at the files anytime he wanted (Wilson deposition 45-46, 67-68). Mr. Wilson stated that in order for Mr. Burbidge to adequately do the job he had been assigned in the dealer cases and landlord case he would have had to go through the McCutchen and Shell files in those cases. In addition, Mr. Burbidge would have had to talk about the cases with the people at Shell (Wilson deposition 67-68).

Mr. Wilson is quite sure he instructed Mr. Burbidge to look at the Lewis file when Mr. Burbidge was doing research on the Abu-Hajar case (Wilson deposition 44, 54). Two of the Lewis cases involved antitrust violations.

In addition, the Abu-Hajar case gave rise to an antitrust complaint to the Federal Trade Commission. The defendant in *Shell* v. *Abu-Hajar* complained to the commission that Shell's termination of its contract with him and his inability to obtain products from others was the result of a conspiracy among the oil companies to put the small businessman out of business (2nd Wilson affidavit). This appears to be the same claim made by plaintiffs in these cases. Although Mr. Burbidge may not have actually represented Shell with regard to the FTC complaint, he did represent Shell in the Abu-Hajar matters and had access to all the files.

Mr. Burbidge represented an Exxon employee in *Kinsey* v. *Humble Oil and Refining Co.* In the Kinsey case, Exxon counterclaimed against the plaintiff for interference with contractual relationships it had with the commission managers and interference with business relationships it had with wholesale and retail customers (Pugh affidavit).

The Kinsey case gave rise to a companion antitrust action, *Hines* v. *Humble Oil and Refining Co.*, brought in federal court. Kinsey, a former sales supervisor for Exxon, and approximately 20 dealers and commission managers of Exxon challenged the various marketing practices engaged in by Exxon. The deposition of Mr. Keith Pugh, counsel for Exxon confirms the fact that there were charges of both horizontal and vertical antitrust violations involved in the Hines case (Pugh deposition 50-53). Mr. Pugh stated that he had conversations with Mr. Burbidge in which they discussed the issues in the Hines and Kinsey cases. (Pugh deposition 52 and Pugh affidavit).

Finally, Mr. Fudge, a partner in the McCutchen firm, stated that at one time he referred Mr. Burbidge to a memorandum filed on behalf of Exxon in *Murdock* v. *Humble Oil and Refining Co.* The Murdock case was a

suit brought by a service station manager of Exxon on behalf of all Exxon managers in California, seeking the recovery of certain operating costs and expenses which the complaint alleged had been improperly charged against the manager's commission accounts. Mr. Burbidge had access to that entire file, which Mr. Fudge considered to contain confidential information (Fudge affidavit).

The burden on Shell and Exxon in this case is not to show that Mr. Burbidge actually received confidential information or that he disclosed or used such information. It is only necessary to show that the matters involved in the pending suit are substantially related to the matters or cause of action in which Mr. Burbidge previously represented Shell and Exxon, his former clients. *American Can Co.* v. *Citrus Feed Co.*, 436 F.2d 1125 (5th Cir. 1971). Under the rule as stated by the Third Circuit, all Exxon and Shell need show is that Mr. Burbidge might have acquired substantially related material. *Richardson* v. *Hamilton International Corp.*, 469 F.2d 1382 (3rd Cir. 1972).

It is clear that this Court cannot inquire into whether Mr. Burbidge actually received confidential information during his employment with the McCutchen firm:

> ". . . Such an inquiry would prove destructive of the weighty policy considerations that serve as the pillars of Canon 4 of the Code, for the client's ultimate and compelled response to an attorney's claim of non-access would necessarily be to describe in detail the confidential information previously disclosed and now sought to be preserved. Thus, where 'it can reasonably be said that in the course of the former representation the attorney *might* have acquired information related to the subject matter of his subsequent representation,' . . .it is the court's duty to order the attorney disqualified." *Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F.2d 562, 577 (2nd Cir. 1973).

In *Chugach Electric Ass'n* v. *United States District Court for the District of Alaska,* 370 F.2d 441 (9th Cir. 1966), the Court held that disqualification of the attorney in that case was required. The Court stated that the secret and confidential information available to the disqualified attorney did not have to be specified. Such specification would entail disclosure of the very confidences the Canons seek to protect.

In Arizona Bar Grievance Committee Opinion No. 71-33, the Ethics Committee quoted from a previous opinion:

> "... A lawyer should not accept litigation against a former client under any circumstances, if such would result in conflict of interests or disclosure of confidences of the former client. In such a situation a court is justified in enjoining a lawyer from proceeding with the litigation against the former client."

The Committee goes on to say:

> "It is the honor of the legal profession that if fidelity to its clients can be depended upon, that a person may safely go to a lawyer and counsel with him upon personal and confidential matters with the absolute assurance that the lawyer's tongue is tied from ever divulging it, and a strict enforcement of this rule requires that an attorney, on terminating his employment, cannot thereafter act as counsel against his client in the same general matter, even though, while acting for his former client, he acquired no knowledge which could operate to the client's disadvantage in the subsequent, adverse employment ..."

Mr. Burbidge spent a considerable amount of time on Shell and Exxon matters. Although the exact nature of the information he received is unknown, it

is known that he had access to confidential information about Shell and Exxon's dealer relationships, marketing practices and antitrust suits.

This Court cannot permit Mr. Burbidge to place himself in a position where, even unconsciously, he will be tempted, or it appears to the public and his former clients that he might be tempted, in the interests of his new clients, to take advantages of information derived from confidences placed in him by Shell and Exxon. See, *T. C. Theatre Corp* v. *Warner Bros. Pictures,* 113 F.Supp. 365 (S.D. N.Y. 1953); *Richardson* v. *Hamilton International Corp., supra.*

It is well established that the law firm with which the disqualified attorney is associated is also disqualified from representing interests adverse to the former clients. *Opinion No. 71-33, supra; Consolidated Theatres* v. *Warner Bros. Circuit Management Corp.,* 216 F.2d 920 (2nd Cir. 1954); *American Can Co.* v. *Citrus Feed Co., supra.* The rationale behind this rule is that there is imputation of the knowledge and insights of the former client's affairs gained by the disqualified attorney, to all partners and employees of the law firm with which he is presently associated. Thus, the Berman law firm must be disqualified from representing plaintiffs against Exxon and Shell if Mr. Burbidge is disqualified.

Without making a thorough investigation of the potential conflict betwen Mr. Burbidge's past and proposed employment, Mr. Berman hired Mr. Burbidge away from the McCutchen firm with the knowledge that he had been working for Shell and Exxon. There is nothing in the record to show that Mr. Berman at any time prior to hiring Mr. Burbidge, consulted anyone in the McCutchen firm about the proposed hiring. It appears that neither Mr. Berman nor Mr. Burbidge ever discussed with anyone, in either the McCutchen firm or any of the attorneys for de-

fendants Exxon and Shell in these cases, the possibility of a conflict with respect to Mr. Berman's hiring or anticipated hiring of Mr. Burbidge, or with respect to the propriety thereof. These lawsuits were then pending and Mr. Berman only saw fit to question Mr. Burbidge after the issue was raised by Mr. Norris, counsel for Exxon, during the deposition of Mr. Timms in one of these cases. Mr. Burbidge was a member of the McCutchen firm while the instant suits were in progress. Mr. Berman had to know that. Yet, within eight days after having been hired away from the McCutchen firm, Mr. Burbidge was actively participating in these suits against his former clients, Shell and Exxon. Mr. Berman would excuse the apparent conflict and impropriety involved here on the grounds that Mr. Burbidge was only a "junior associate". The law and the canons seem to make no such distinction. Both Mr. Berman and Mr. Burbidge had a duty under the circumstances to make full, prior inquiry into the possible conflict and impropriety of their proposed relationship and a full disclosure of their planned relationship to the McCutchen firm and to the attorneys for Exxon and Shell in these cases. The spirit if not the letter of the law and the canons relating to professional conduct seem to require this. Then any questions about the propriety of the representation can be resolved before there is a public dispute about it.

The record in this case discloses that while Mr. Burbidge was with the McCutchen firm he was employed in representing defendants Shell and Exxon in matters which are substantially related to those involved in these cases and had access to files which contained confidential information. It appears that Mr. Burbidge, at the very least, had access to material while engaged as an attorney for Shell and Exxon

which could be helpful to his present clients and harmful to his former clients.

Any doubts as to whether Mr. Burbidge's former representation of Shell and Exxon is substantially related to the present suits must be resolved in favor of Shell and Exxon and the Berman firm must be disqualified. *Fairchild Sanding Disc & Manufacturing Co., Inc.* v. *Taylor,* CIV No. 7211-102(R), February 22, 1974.

The Courts as well as the bar have a responsibility to maintain public confidence in the legal profession. This means that a Court may disqualify an attorney not only for acting improperly but also for failing to avoid the appearance of impropriety. *Richardson* v. *Hamilton International Corp., supra.*

For the above stated reasons this Court concludes that the Daniel L. Berman law firm should be disqualified.

IT IS ORDERED that the defendants' Shell and Exxon Motion to Disqualify, is granted. The law firm of Daniel L. Berman and all members or associates thereof are disqualified from participating in any way in these actions so long as the cases involve Shell or Exxon.

IT IS FURTHER ORDERED that the Clerk of this Court forthwith mail a copy of this Memorandum and Order to all counsel of record.

DATED this 27th day of August, 1974.

/s/ JAMES A. WALSH
James A. Walsh
United States District Judge

/s/ WILLIAM C. FREY
William C. Frey
United States District Judge